19 percent for the two years preceding the financial interest rule's repeal.[59] NBC also elects to provide the Commission with no information concerning the networks' acquisition of financial interests. When in-house production is combined with programs in which the network has taken a financial interest, however, the networks' ownership interest in prime time entertainment series jumps to an average of nearly 40 percent for the two seasons since repeal of the financial interest rule.[60]

CBS, like ABC, offers the Commission no meaningful information concerning the networks' practices in acquiring financial interests in programs. Instead, it simply refers the Commission to the "periodic reports" it files with the agency, asserting that these documents "speak for themselves."[61] These reports may speak for themselves, but, as we explain in Section III, they tell the Commission virtually nothing. This is why the Coalition is requesting that the Commission, at a minimum, strengthen its reporting requirements. Moreover, because the networks are required to file these reports twice a year, they have yet to file any reports concerning programs acquired for the Fall 1995

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59 *See* Appendix A. CBS asserts that "the last full broadcast season" for which in-house production data is available is the 1993-94 season. CBS Comments at 15 n.41. If this were true, then the Commission would have no evidence against which to measure its predictive judgments, because the 1993-94 season, as noted above, is the last season *before* the financial interest rule was repealed. In fact, in-house production has increased dramatically since that season -- a fact that CBS apparently would prefer remain unknown.

60 Coalition Comments at 17.

61 CBS Comments at 15.

television season. Thus, in CBS' view, the Commission should make its decision to repeal the FISR based on sparsely reported facts for a single broadcast season.

When the networks' theoretical view of the television marketplace is weighed against the evidence that was adduced by the Coalition, INTV and King World in the initial comments filed in this proceeding, the record plainly does not provide the substantial evidence the law requires for the Commission to repeal the FISR. Indeed, what few facts the networks present in their comments confirm the adverse trends identified by the Rule's proponents. NBC, for example, claims that the networks' "in-house production of pilots has remained an essentially constant percentage of total pilots commissioned" since 1991.[62] Yet, during this same time period, the percentage of in-house shows reaching the air has increased dramatically.[63] As the Coalition demonstrated in our earlier comments (and NBC has now confirmed),[64] this increase in in-house production has not yet supplanted studio production. Rather, the immediate victims of the networks' documented preference for in-house shows has been the smaller producers -- the very producers the Commission predicted would benefit from repeal of the financial interest rule.

The result of the networks' conduct has been a dramatic diminution in source diversity. Evidence prepared by the network economists, and submitted to the

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62 NBC Comments at 7.

63 *See* Appendix A.

64 NBC Comments at 7.

Commission earlier this week in the PTAR proceeding, proves this point unequivocably. In its 1993 Order, the Commission adopted the networks' measure of source diversity (*i.e.*, copyright ownership in programs) and concluded that tables prepared by the network economists showed that "the production community has become increasingly concentrated under the finsyn regime since 1970."[65] The Coalition disputed (and continues to dispute) the validity of these conclusions, but also predicted that repeal of the financial interest rule would diminish source diversity even as the networks and the Commission define it.[66] The Commission, relying on the networks' theories, predicted precisely the opposite. It observed that in the 1991-92 season, "the total number of suppliers -- 26 -- matched the 1985-86 season's all time low."[67] Allowing the networks to acquire financial interests in programs, the Commission surmised, "will foster an increase in diverse programming."[68]

The evidence submitted by the network economists shows that by the networks' and Commission's own measure, source diversity has declined dramatically since the financial interest rule was repealed. As graphically illustrated in Appendix B, the networks' data reveal that the number of program suppliers has fallen from 29 in 1993-94 (the last television season before the financial interest rule was repealed) to 17 in the upcoming 1995-96 season, a decline of over 40 percent. Faced with unambiguous

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65 Second Report and Order at 3310-11.

66 Coalition Comments at 13-14.

67 Second Report and Order at 3310 n. 64.

68 *Id.* at 3288.

evidence that the Commission's predictions were wholly inaccurate -- and, indeed, that the repeal of the financial interest rule has *diminished* diversity -- the Commission must preserve and strengthen the FISR. Any other decision by the Commission would be "unreasoned and unreasonable."[69]

C. Changes In The Television Marketplace Have Not Diminished The Networks' Power In The Program Purchasing Market

The networks spend the vast majority of their comments attempting to show that they are "even weaker today" than they were in 1993.[70] The networks observe that their share of the prime time audience has dipped below 60 percent[71] and claim that they now face vigorous competition from a variety of sources, including two incipient networks, cable networks, DBS, and even "telco/video."[72] But, as they have throughout this proceeding, the networks confuse the markets that are relevant to a proper assessment of the continuing need for the FISR. As a result, the evidence they proffer concerning marketplace developments in the last two years offers no support for their plea for immediate repeal of the Rule.

The Coalition has never disputed the networks' argument that they have lost some of their audience to Fox, independent stations and cable networks since the FISR

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69 *Schurz*, 982 F.2d at 1055.

70 *E.g.*, *id.* at 3.

71 NBC Comments at 3; ABC Comments at 5; CBS Comments at 10.

72 NBC Comments at 4-5; ABC Comments at 5-8; CBS Comments at 12-14.

was adopted. This fact, however, says nothing about whether the networks continue to have market power in the acquisition of prime time entertainment series programming.

The market for the acquisition of prime time entertainment programming is separate and distinct from the market for viewers. The networks' ability to exercise power in the programming market turns on the ability of suppliers of network prime time programming to distribute those products through other outlets if the networks lower the prices they pay for such programming below the competitive level. The fact that some of the networks' former viewers now watch news on CNN, or public affairs on C-SPAN, or music videos on MTV, or sports on ESPN, does not mean that these are viable alternative purchasers for producers of prime time network entertainment programming. The Ninth Circuit made precisely this point in a case in which the Justice Department alleged that an owner of first-run movie theaters had monopolized the market for the acquisition of rights to first-run films. The defendant argued that he had no monopoly because theatergoers could watch movies on home video, cable and pay-per-view instead. The Ninth Circuit agreed with the Justice Department that this argument was irrelevant: "While moviegoers may well view these alternative methods of film exhibition as readily substitutable, film distributors do not."[73] The same is true here: while television viewers may view cable and VCRs as substitutes for network television, producers of network prime time entertainment programs do not.

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73 *U.S. v. Syufy Enters.*, 903 F.2d 659, 665 n.9 (9th Cir. 1992).

The networks have confused these two markets throughout this proceeding, consistently pointing to the loss of audience share as evidence that they no longer have power in the market for the acquisition of prime time entertainment programming. In its 1993 Order, the Commission accepted this flawed reasoning.[74] The Commission employs a far more refined analysis, however, in its 1995 Further Notice in the television ownership proceeding; it expressly recognizes that there are distinct markets for (1) "delivered video services" (*i.e.*, viewers); (2) "advertising"; and (3) "video program production."[75] The network economists, in their comments in that proceeding, embrace this analytical framework.[76]

In the market for video program production, the network economists' observe, "[u]nder certain conditions, a single buyer or a small group of buyers acting in a coordinated fashion could have an incentive to reduce the purchases of some input below the amount that would be chosen under competitive conditions. The purpose of reducing purchases would be to reduce the price that the firm or firms would then pay on the remaining purchases of this input . . . . The Commission's interest in the purchasing of video programming is motivated by the possibility of monopsony or oligopsony power."[77] It is the networks' exercise of such power, as the Coalition's earlier comments in this

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74 Second Report and Order at 3303-04.

75 TV Ownership FNPRM at 3535.

76 Network Economists' Report, Vol. 1 at 9, 18 & 38.

77 *Id.* at 38-39 (citation omitted).

proceeding make clear, that warrants the preservation of safeguards with respect to the networks' acquisition of financial interests in programs.

The network economists contend that the networks cannot exercise monopsony power in the acquisition of programming because this market must be defined to include "all video programming."[78] Using this market definition, ABC asserts that each network's share of the market was approximately 9.4 percent in 1994.[79] -- a level too low to afford the networks monopsony power. The absurdity of the networks' overly broad market definition is apparent on its face. If the networks' market shares are truly this low, after all, and other distribution outlets place the degree of competitive constraint that the networks assert, then the Commission and the Justice Department should have no objection to a merger of all three traditional networks.

The reason that the networks' market shares are, by their measure, so low becomes readily apparent once their economists' calculations are carefully scrutinized. For example, the networks include in the "video programming market" $4.3 billion in expenditures on "home video."[80] A producer of a prime time entertainment series, however, cannot sell a weekly show through home video. For this reason, in the television ownership proceeding, the Commission correctly declined to include VCRs in

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78 *Id.* at 39.

79 ABC Comments at 8.

80 *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules*, Economists Incorporated, "An Economic Analysis of the Prime Time Access Rule," at Appendix G (Mar. 7, 1995).

the market for viewers.[81] There is no plausible claim that home video revenues belong in a properly defined market for the acquisition of prime time entertainment series.

The record in this proceeding uniformly supports this conclusion. The Steering Committee of the Caucus of Producers, Writers & Directors, on behalf of its numerous members, submitted a declaration stating that if the networks paid them less than they currently do for programming capable of successful syndication, they would nonetheless continue to sell this type of programming to the networks because it would continue to be their most profitable alternative.[82] This declaration continues to stand, uncontested, as proof that the scope of the market is not as broad as the networks claim.

The networks claim that other outlets, especially cable networks and first-run syndication, belong in the relevant market because some producers of prime time entertainment series occasionally sell programs to these outlets. As the Justice Department has previously observed, however, the Supreme Court "has instructed that a small degree of substitutability is not sufficient to justify including a product in a relevant market."[83] Thus, in the movie theater case discussed above, the Justice Department concluded that even though producers of theatrical films also produce movies for cable, pay-per-view or

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81 TV Ownership FNPRM at 3538-39. In fact, evidence adduced by the networks in the television ownership proceeding shows that the "overwhelming majority" of people who record programs with their VCRs are recording *network programming*. Network Economists' Report, Vol. 2, App. H at 28.

82 Coalition Comments, Exhibit 1, Attachment C.

83 Brief for Appellant United States of America, *U.S. v. Syufy Enters.*, No. 89-15475 (9th Cir. filed Apr. 24, 1989) at 28 n.24.

home video, there is a separate market for first-fun exhibition of movies in theaters.[84] The Ninth Circuit agreed.[85]

The same analysis applies with equal force here. The fact that some producers of network prime time entertainment series occasionally produce programs for cable or first-run syndication does not establish that they could sell network quality prime time programs through those outlets. Absent such a showing -- one that the networks have *never* been able to make -- the Commission must conclude that there is a separate market for the purchase of prime time entertainment series that continues to be dominated by the television networks. In fact, the networks conceded this point just last month in the Commission's television ownership proceeding. According to the networks' filing, "[t]he real appeal of the networks to the viewers is its programming. *No one can compete with the networks in this arena . . . . Only the networks have the wherewithal to afford the kind of high quality programming that the American public demands.*"[86]

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84 *Id.* at 27-29.

85 *Syufy*, 903 F.2d at 665 n.9.

86 Network Economists' Report, Vol. 2, App. H at 36 (emphasis supplied). With respect to cable, the networks point out that "it has had to deal with the reality of production costs and the need to provide audiences for advertisers. Consequently, the larger cable networks provide mostly mass appeal fare -- much of it reruns off the Nets." *Id.* With respect to first-run syndication, the networks point out that nineteen of the top twenty regularly scheduled programs air in prime time on ABC, CBS and NBC. *Id.* at 11. Because "[s]yndication offers neither day part nor station uniformity," and markedly less audience reach than the networks, it is not a reasonable substitute for network distribution from the perspective of a producer of prime time entertainment programs. *See id.* at 30; *see also* Coalition Comments, Exhibit 1, Appendix C. Fox, as we explained in our earlier comments, has not changed the competitive dynamic in the purchase of prime time entertainment programs. It has simply followed the networks' pattern of purchasing practices.

The networks nonetheless point to three developments since the Commission's 1993 decision that they claim warrant immediate repeal of the Rule: (1) the launch of two incipient television networks; (2) the growth of DBS; and (3) the "looming presence" of "telco/video." The reality of the marketplace, as the networks themselves well know, is that none of these alternative broadcast outlets exercises a significant competitive constraint on the networks today.

Indeed, in the Commission's television ownership proceeding, the networks introduced evidence that proves precisely this point. With respect to the recently launched networks, for example, the networks observe: "At this stage, these new 'networks' are closer to syndicators than real networks. Both UPN and WB have limited clearances and their schedules do not run on the same day and time in every market . . . . Both UPN and WB's long term viability is limited."[87] The report also explains, as noted above, that the networks have significant competitive advantages over cable and first-run syndication.[88] Not surprisingly, it does not even mention DBS or telco/video. Neither exercises any demonstrable competitive constraint on the networks today.

As the Coalition made plain in its initial comments, we are not asking the Commission to preserve the FISR in perpetuity. Some of the alternative outlets to which the networks have pointed may ultimately develop in such a way as to obviate the need for the Rule. That day, however, has not yet arrived. The Commission cannot rest a decision

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87 Network Economists' Report, Vol. 2, Appendix H at 33, 36.

88 *Id.* at 31.

to repeal a rule that continues to serve the public interest in broadcast diversity on the networks' conjecture that new networks, DBS or telco/video will mature rapidly enough to constrain the television networks' exercise of their power in the market for the purchase of prime time entertainment programming. What the Commission should do, instead, is revisit the Rule in 1999 to determine whether these technologies have, in fact, developed to the point that the protections of the FISR are no longer required.

Finally, the networks argue that there is no evidence to suggest that they have exercised their market power in the two years since the financial interest rule was repealed. Specifically, CBS argues that "changes in network program acquisition practices have been very gradual."[89] Of course, if this is true, then it simply confirms the *in*accuracy of the networks' claims that producers would realize significant benefits from repeal of the financial interest rule. After all, if those benefits were genuine, then one would expect to see producers -- especially small producers -- clamoring for network financing, and the networks supplying such financing to as many shows as possible. As the Coalition has demonstrated, the reality has been that the networks have taken financial interests selectively in shows produced by large, well-established production companies. The fact that they have not taken an interest in more of these programs only suggests, as we explained in our opening comments, that the networks have been keenly aware that their conduct during these two years would be reviewed carefully by the Commission.

89 CBS Comments at 15.

The Commission must assume that the "gradual" change in the networks' program acquisition practices will accelerate rapidly if and when the agency repeals the Rule and averts its careful watch.

The record, in sum, supports one conclusion, and one conclusion only: that the elimination of the FISR will result in the networks' full exploitation of their continuing power. The victims of this conduct will be program producers (particularly smaller producers), independent television stations, and, ultimately, the viewing public.[90]

III. THE COMMISSION MUST PRESERVE AND, INDEED, SHOULD STRENGTHEN ITS REPORTING REQUIREMENTS

When the Commission decided to relax and eliminate portions of the Rule in 1993, it correctly concluded that reporting requirements were necessary.[91] The Commission recognized that only with reporting requirements could it "monitor the efficacy of the rule changes . . . and oversee the networks' conduct in the program acquisition and syndication markets."[92] Regardless of whether the Commission decides to retain, revise or eliminate entirely the remaining restrictions, it must preserve and, indeed, strengthen the reporting requirements. Certainly, if the Commission continues to rely on

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90 This is why, as we explained in our initial comments, the Commission must readopt the separate negotiation safeguard and limit the number of option terms the networks can require a producer to surrender. Absent such safeguards, the networks will be able to exploit more fully the monopsony power they retain today.

91 Second Report and Order at 3335-37.

92 *Id.* at 3337.

the networks' predictions and permits the Rule to expire, it must strengthen these reporting requirements so that interested parties and the Commission itself can later make an informed judgment as to whether the networks' predictions have proven to be accurate.

The Commission must strengthen its reporting requirements because the networks have interpreted the current requirements in a manner that results in their reporting very limited information about their financial interests and syndication rights. For example, in response to the requirement in Section 73.661(a) of the Commission's rules that the network identify "the nature of the [financial] interest or [syndication] right held in the program," each network simply states in its report whether it has a financial interest and/or syndication right in a program, without providing any description of the nature of that interest or right.

To ensure more complete and meaningful reporting, the Coalition proposes that the Commission require the networks to use the proposed form attached at Appendix C. The proposed form incorporates and expands upon the existing reporting requirements (for example, by enumerating specific factors in identifying the nature of the interest or right held in a program). Without exception, all of the information requested on the proposed form will be readily available to the networks and, therefore, will not impose an unreasonable burden on the them.

The proposed form would require the networks to report on all prime time programs, not simply prime time entertainment programs. Limiting the reporting rule to entertainment programs, as is currently the case, excludes news magazine programs such as *Real Life with Jane Pauley*, which are increasingly becoming a part of the networks' prime time schedules and, in the process, replacing pure entertainment series. The networks should be required to report on *all* of their prime time programs in order to provide a complete picture of their financial interests during prime time.

The networks should also be required to report on the financial interests and syndication rights acquired in all pilots, presentations or series that are *ordered,* not just those that are aired. As we explain above, while the networks have not increased the fraction of total pilots they produce in-house, a much larger percentage of in-house productions are making it to the prime time schedule. A more complete set of information concerning programs for which financial interests are negotiated will enable the Commission to monitor more effectively the networks' acquisition of such interests and their decisions with respect to which shows are ultimately aired.

With respect to the other proposed requirements, some will better categorize the nature of the programs in which the networks are acquiring financial interests and syndication rights (*e.g.*, length of program, type of program, genre). Others are aimed at assessing diversity in the marketplace (*e.g.*, production company, copyright holder, executive producers). In addition, to the extent the Commission does not adopt a rule imposing option term limits, the proposed form will at least ensure that the Commission receives sufficient information to evaluate network conduct and detect abusive network practices.

The networks claim that they have no market power to abuse.[93] If this is true, then they have no reason to object to reporting to the Commission information pertaining to their conduct in acquiring financial interests or syndication rights. Without this information, by contrast, the Commission will not be able to assess the accuracy of the networks' predictions and, more importantly, the actual impact of the Rule's further relaxation or elimination on the public. The relative costs and benefits of adopting strengthened reporting requirements, in short, weigh heavily in favor of requiring the networks to report meaningful information to the Commission.

93 *E.g.*, NBC Comments at 3; CBS Comments at 10; ABC Comments at 5.

CONCLUSION

For the reasons set forth above, as well as those set forth in our initial comments, the Coalition urges the Commission to (1) retain the existing syndication restrictions, (2) strengthen the Rule with respect to network acquisition of back-end rights, including financial interests, (3) schedule another review for 1999, (4) in the event the Commission allows the syndication restrictions to expire, retain the warehousing prohibition and adopt an affiliate favoritism prohibition; (5) adopt a rule imposing a four-year option term limit; and (6) irrespective of its other actions, retain and strengthen the reporting requirements.

Respectfully submitted,

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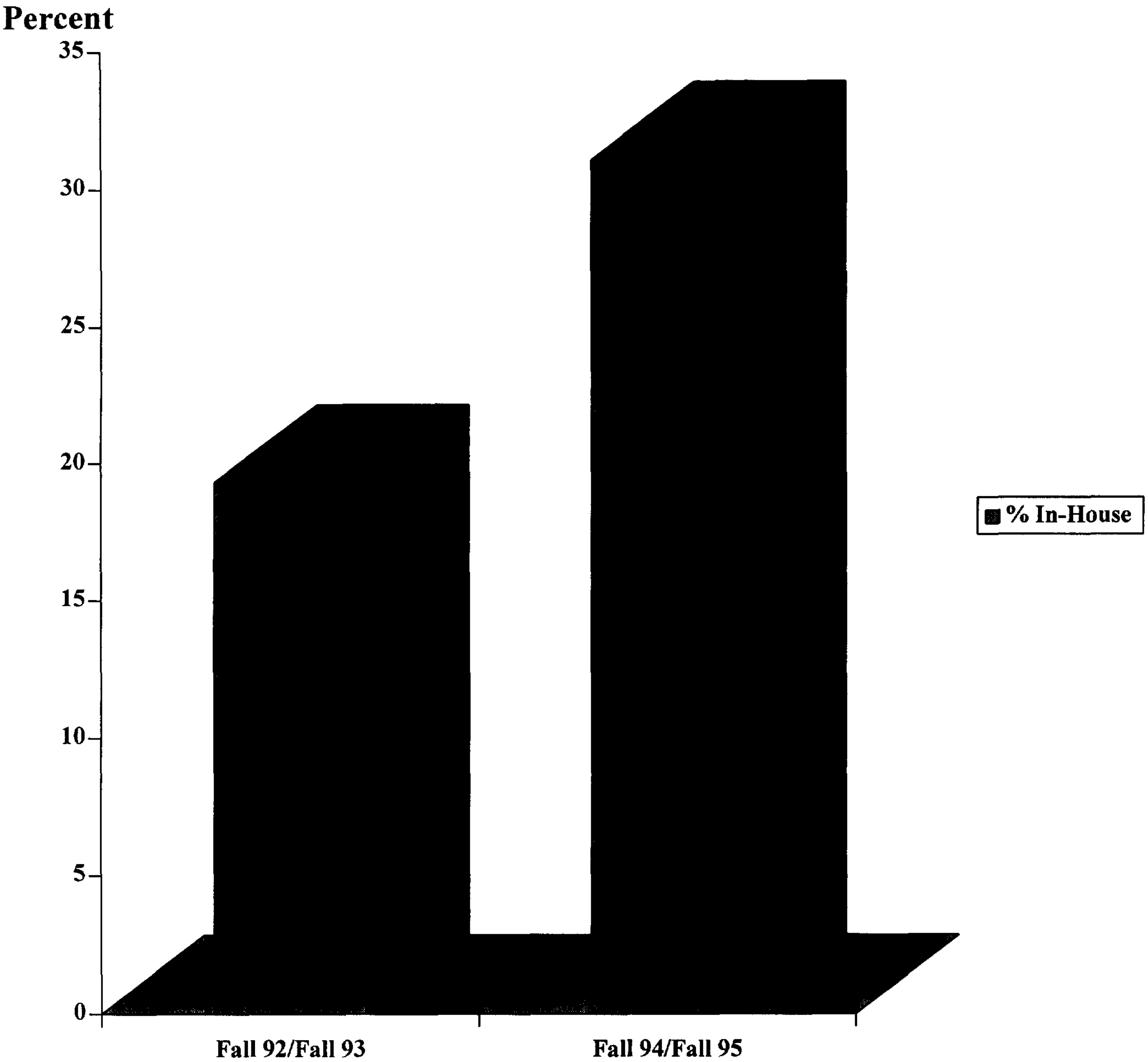
Financial Interest and Syndication Rule

June 14, 1995

A

Network In-House Regularly Scheduled Prime Time Entertainment Series Pick Ups*

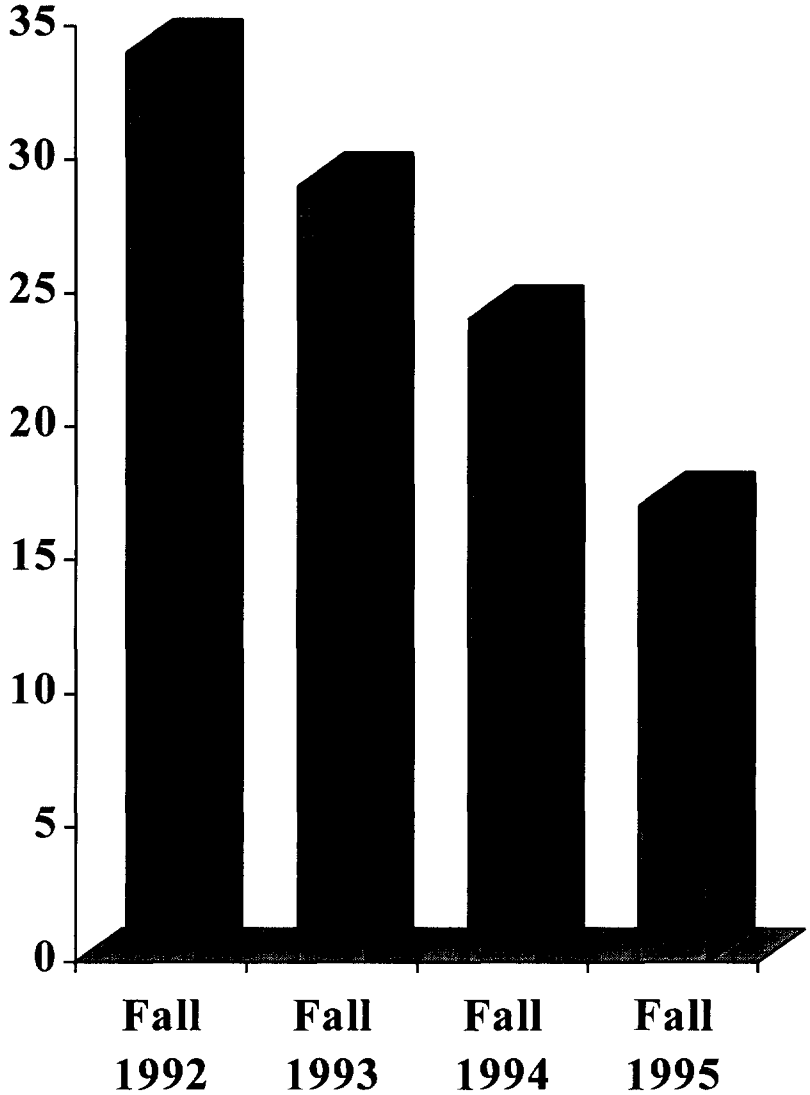


*Does not include sports or news magazine programs

Appendix A

B

Number of Suppliers of Prime Time Entertainment Series



Source: Economists Incorporated,"An Economic Analysis of the Prime Time Access Rule," at 106, 106A (as corrected on June 12, 1995), filed in MM Docket No. 94-123.

Appendix B

C

FINANCIAL INTEREST AND SYNDICATION RULE
REPORTING REQUIREMENTS FORM

-A separate form must be filed for each prime time presentation, pilot, series, mini-series, special, made-for-TV movie or prototype that the network orders or airs.

-For network programs, a separate form must be filed each year the program airs on a network or network-affiliated station. For first-run programs, a separate form must be filed each year the program airs in syndication.

NETWORK:

NAME OF PROGRAM:

aka (if any):

1. Type of program distribution (check one):
   [ ] Network
      If the program airs on another network, which one? _____
      Date program began network run:
      Date program ended network run (if applicable):

   [ ] First-Run
      Date program first regularly exhibited or scheduled in syndication:
      Date program stopped being distributed for first-run syndication (if applicable):

2. Length of presentation, pilot, prototype (check one):
   [ ] ½ hour
   [ ] 1 hour
   [ ] 2 hours
   [ ] other (please specify) __________

3. Length of series, mini-series, special, made-for-TV movie, if different from above (check one):
   [ ] ½ hour
   [ ] 1 hour
   [ ] 2 hours
   [ ] other (please specify) __________

Appendix C

4. Type of program (check one):
   [ ] presentation
   [ ] pilot
   [ ] prototype episode as part of series order

   [ ] series
   [ ] mini-series
   [ ] special
   [ ] made-for-TV movie

5. Genre (check one):
   [ ] sitcom
   [ ] drama
   [ ] news or news magazine
   [ ] reality
   [ ] sports
   [ ] special
   [ ] made-for-TV movie
   [ ] mini-series
   [ ] other (describe) __________

6. Production company of program (list all companies "credited"):

7. Copyright owner(s):

8. Executive producer(s) and credited writer(s) of program:

9. Were domestic distribution rights obtained by network?
   [ ] yes
   [ ] no

   a. Was there a separate amount or other consideration paid (*i.e.*, in addition to the license fee)?
      [ ] yes
      [ ] no
      If yes, please describe.

b. Were the syndication rights retained by network or transferred to a third party? (check one)
[ ] retained
[ ] transferred to:
Independent syndicator (specify name and address):

Date of agreement under which independent syndicator obtained rights:

c. List all network owned and operated stations and all affiliated stations that have obtained the program for exhibition "off-network" or in first-run syndication (for each station, identify station call sign, owner, market, and availability (*i.e.*, license period)).

10. Were foreign syndication rights obtained by network?
[ ] yes
[ ] no

a. Was there a separate amount or other consideration paid (*i.e.*, in addition to the license fee)?
[ ] yes
[ ] no
If yes, please describe.

b. Were the syndication rights retained or transferred to a third party? (check one)
[ ] retained
[ ] transferred to:
Independent syndicator (specify name and address):

Date of agreement under which independent syndicator obtained rights:

c. List of all foreign markets (city and country) that have obtained the program for exhibition in syndication:

11. Did network obtain a financial interest?
[ ] yes
[ ] no

a. Did network fully finance program "in house"?
[ ] yes
[ ] no

b. If not, did independent production company fully finance program?
[ ] yes
[ ] no

c. Was program financed by more than one entity?
[ ] yes
[ ] no
If yes, please list each entity's name (including the network, if applicable), address, and date of agreement.

d. Was a separate amount or consideration paid by the network for the financial interest?
[ ] yes
[ ] no
If yes, please describe.

e. Describe the financial interest required (including percent financial interest obtained):

12. Number of option years initially acquired by network:
For Fall start __________
For midseason start __________

Were additional option terms acquired? If so,
Date acquired:
Number acquired:
Consideration paid (describe):

13. Did the network or other agreement pertaining to distribution rights contain any restrictions on warehousing (including exclusivity on the network) or other controls over distribution?
[ ] yes
[ ] no
If yes, please describe.